Filed 12/15/08 P. v. Bryan CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. PAUL K. BRYAN, Defendant and Appellant.	B201296 (Los Angeles County Super. Ct. No. KA078168)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Horan, Judge. Affirmed.

Jennifer Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr. and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

On appeal from a conviction of assault with a deadly weapon, defendant and appellant Paul K. Bryan contends the trial court prejudicially erred in admitting evidence of defendant's prior encounters with the victim. We affirm.

FACTS

We recount the evidence in accordance with the usual rules of appeal. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) In the early morning hours of October 24, 2006, Robert Tetreault, a tow truck driver employed by J & D Towing, towed defendant's Ford F-150 parked illegally at the Cottage Apartments, to J & D's tow yard. A few hours later, Tetreault returned to the yard to meet defendant about retrieving his F-150. As Tetreault remained seated in his truck parked outside the locked entrance gate to the yard, defendant argued with him over whether the F-150 had been illegally parked and defendant's refusal to pay the towing fee. When defendant reached into his pocket, Tetreault was afraid defendant might be reaching for a gun. As Tetreault was dialing the police, defendant entered the fenced area where the F-150 was parked, started the vehicle and drove it out of the tow yard by crashing through the locked gate, taking the gate off its hinges in the process.[1]

A little more than four months later, in the early morning hours of Sunday, February 19, 2007, Tetreault had already attached to his tow truck a car illegally parked at the Cottage Apartments and was beginning to drive away when defendant came out of an apartment and tried to persuade Tetreault to stop towing the car. After promising to pay the $75 "drop fee," defendant went back into the apartment from which he had come

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[1] Defendant admitted that he took his truck out of the tow yard that night by "squish[ing] through the gate . . . [and using my alarm key] did my alarm and my truck doors opened and there were dogs and I jumped right in my truck to avoid these dogs from biting me. . . . I pulled to the front of the gate. I popped the gate. I actually popped the gate, broke the gate off – broke the gate down and took my truck." But defendant denied having any conversation with Tetreault that night. When defendant was contacted by a police officer a few days later, he told the officer what happened; no charges were filed.

and returned with a woman who Tetreault understood to be the owner of the car. Defendant's initially calm demeanor changed after Tetreault told defendant that he recognized defendant as the person who drove a truck through the tow yard gate a few months before. It was then that defendant "wielded his [right] arm back like he was in a pitching motion." As Tetreault tried to speed away, defendant threw a rock through the open driver's side window of Tetreault's truck, saying "I am going to drive this truck through your head." The rock hit Tetreault in the left temple and landed inside the truck. As he drove away, Tetreault observed defendant apparently looking for something else to throw at him. Scared because he understood defendant's statement as a threat, Tetreault drove to a police station and filed a police report. Tetreault identified defendant as his assailant from a photographic line up.

Olga Hernandez, the owner of the car Tetreault was towing at the time of the incident, testified that in February 2007, she and her boyfriend rented space in Kavis Knight's apartment. The night her car was towed, a man she did not know negotiated with the tow truck driver to drop her car for $50. As Hernandez was walking to the apartment to get the money, the tow truck driver "took off and the guy was chasing him. That's about the last thing I had seen." When Hernandez was interviewed by the police about the incident a few days later, she told them she saw the man "swinging his arm like he was throwing something." Hernandez saw defendant for the first time at trial; she did not recognize him as a friend of Knight's and she had never seen him around the apartment complex. She was not afraid.

Defendant testified that he did not know Hernandez and he was not the person who threw a rock at Tetreault. He maintained that from about 2:00 a.m. on February 18, 2007, until his arrest the afternoon of February 19, 2007, he was at his mother's home in Pomona with other family members gathered to grieve over his uncle, who had been murdered the day before. Two of defendant's aunts confirmed that they saw defendant at the home of their sister, defendant's mother, during the relevant time.

PROCEDURAL BACKGROUND

Defendant was charged with assault with a deadly weapon and making criminal threats against Tetreault. At an Evidence Code section 402 hearing prior to trial, defendant objected on relevance grounds to admission of the evidence that defendant drove his truck through the tow yard gate in October 2006. He suggested the evidence be confined to the fact that on that occasion defendant had an argument with Tetreault about releasing his truck from the tow yard. The prosecutor countered that the violent manner in which defendant left the tow yard was probative of the sustained fear element of the Penal Code section 422 (§ 422) charge. The trial court agreed and overruled the objection.

Following a jury trial, defendant was acquitted of the criminal threats charge, but found guilty of assault with a deadly weapon. He was sentenced to three years in prison. He filed a timely notice of appeal.

DISCUSSION

No Abuse of Discretion to Admit Evidence of October 2006 Incident

Defendant's sole contention is that the trial court erred in allowing the prosecutor to introduce evidence of the October 2006 incident. Conceding that evidence of the prior encounter was relevant to the disputed issue of identity, he argues the evidence that defendant snuck into the tow yard and drove his truck through the locked gate was (1) not relevant to any material issue and (2) was cumulative and unduly prejudicial under Evidence Code section 352. Both arguments are meritless.

Only relevant evidence is admissible and, with certain statutory exceptions, all relevant evidence is admissible. (Evid.Code, §§ 350, 351.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid.Code, § 210.) The trial court has discretion to exclude even relevant evidence, the probative value of which is *substantially* outweighed by, among other things, the probability that its admission will create a substantial danger

of undue prejudice. (Evid.Code, § 352.) In this context, unduly prejudicial evidence is evidence that evokes an emotional bias against the defendant without regard to its relevance to material issues. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) We review the trial court's evidentiary rulings for abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113; *People v. Mayo* (2006) 140 Cal.App.4th 535, 553.)

In pertinent part, Penal Code section 422 (§ 422) makes it a punishable offense to "willfully threaten[] to commit a crime which will result in death or great bodily injury to another person . . . ." An element of the offense is that the threat causes the victim "reasonably to be in sustained fear for his or her own safety . . . ." "The victim's knowledge of defendant's prior conduct is relevant in establishing that the victim was in a state of sustained fear." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.) And surrounding circumstances can change seemingly non-specific words into a threat. (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340, superseded by statute on other grounds as noted in *People v. Franz* (2001) 88 Cal.App.4th 1426, 1441.) For example, in *Mendoza*, the court reasoned that, although the defendant's statement: "you fucked up my brother's testimony. I'm going to talk to some guys from [the defendant's gang]," did not articulate a threat to commit a specific crime resulting in death or great bodily injury, the jury could reasonably infer the words were intended to do so from the evidence that the defendant and victim had been fellow gang members, the victim had given damaging testimony in the defendant's brother's preliminary hearing and the victim knew the defendant's fellow gang members were capable of violent retaliation. (*Ibid*.; see also *People v. McCray* (1997) 58 Cal.App.4th 159, 172 [evidence of defendant's prior violent conduct toward victim relevant to sustained fear element of § 422 charge].)

Here, we find no abuse of discretion in the trial court's conclusion that the circumstances of Tetreault's prior encounter with defendant were relevant to elements of the section 422 charge. As in *Mendoza*, *supra*, 59 Cal.App.4th at page 1340, evidence that defendant drove his truck through the locked tow yard gate during the prior encounter gave meaning to defendant's otherwise ambiguous statement, "I am going to

drive this truck through your head," uttered during the charged offense.[2] Moreover, evidence that Tetreault witnessed defendant forcefully remove his truck from the yard on the prior occasion was probative of whether Tetreault was reasonably in sustained fear for his own safety as a result of defendant's threat, another element of the section 422 charge. The jury could reasonably infer that, because Tetreault witnessed defendant's brazen conduct in October, it was reasonable for Tetreault to understand defendant's statement as more than an idle threat and to be in fear; a reasonable person, who had no prior experience of defendant, might have had a different reaction.

As to defendant's final point, we preliminarily note that defense counsel did not specifically object to the evidence on Evidence Code section 352 grounds. (*People v. Harrison* (2005) 35 Cal.4th 208, 240 [specific objection required to preserve claim that trial court abused its discretion in not excluding evidence under Evid. Code, § 352].) Even if we construe the stated objection broadly (see e.g. *People v. Gibson* (1976) 56 Cal.App.3d 119, 137 [reasonable interpretation of objection was that counsel was relying on § 352 and trial judge so understood]), we find no abuse of discretion in the trial court's implicit conclusion that the evidence was not cumulative nor was its probative value substantially outweighed by its potential for prejudice. This is because there was very little evidence other than the challenged evidence from which it could be inferred that defendant's statement was, indeed, a threat to do great bodily harm and that Tetreault was reasonably in sustained fear.

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[2] We note that the police officer who interviewed Tetreault testified that Tetreault told him that defendant threatened to shoot Tetreault if Tetreault did not put down the car he was towing; Tetreault did not tell him that defendant said, "I will drive a truck through your head." It was up to the jury to determine which, if either, of these two statements defendant made. Evidence tending to show the meaning of the less specific threat was relevant irrespective of the evidence of the specific threat.

DISPOSITION

The judgment is affirmed.

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RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BIGELOW, J.